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In the Supreme Court

of the United States

OCTOBER TERM, 1950

No. 759

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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No. .....

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY IT PLEASE THE COURT:

The petitioner, Haleston Drug Stores, Inc., respectfully petitions this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit to review a decree dismissing the petition of Haleston Drug Stores, Inc., for review of an order of

the National Labor Relations Board affirming an order of the Trial Examiner dismissing an unfair labor practice complaint issued by the General Counsel of the National Labor Relations Board.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner operates four retail drug stores in Portland, Oregon.

In October, 1948, petitioner filed a petition for Certification of Representatives with the National Labor Relations Board designating a named union as one claiming recognition.

In March, 1949, petitioner filed an amended charge against other unions alleging said unions were guilty of an unfair labor practice under Sec. 8(B)(2) of the National Labor Relations Act (29 U.S.C. 158(B)(2), in attempting to force petitioner to sign a collective bargaining agreement containing illegal union security provisions and thereby attempting to cause petitioner to discriminate against his employees in violation of Section 8(A)(3) of the National Labor Relations Act (R. 2). (29 U.S.C. 158(A)(3)).

The General Counsel thereupon issued an unfair labor practice complaint (R. 5).

In April, 1949, after a hearing in the representation case, the National Labor Relations Board made findings respecting petitioner's business, and then, without de-

ciding whether or not the petitioner's operation affected commerce within the meaning of the National Labor Relations Act, dismissed the petition on the ground that it would not effectuate the policies of the Act to assert jurisdiction inasmuch as the petitioner's business was essentially local in character (R. 68).

In August, 1949, in the unfair labor practice case, without a hearing, the trial examiner granted the union's motion to dismiss the complaint predicating the dismissal order on the ruling of the Board in the representation case (R. 16). The National Labor Relations Board, on review of the order of the Trial Examiner dismissing the unfair labor practice complaint, assumed as true facts petitioner offered to prove to the effect that purchases of petitioner amounted to $323,938.00, of which approximately 20% were purchased and shipped from concerns and points outside the State of Oregon; approximately 23% were purchased from firms outside the State of Oregon but supplied from warehouses located inside the State of Oregon; approximately 16% were purchased from local salesmen but shipped from points outside the State of Oregon; approximately 40% were mainly local products purchased from local suppliers and that sales totaled $478,108.00 and were all made locally (R. 19, 25). The Board affirmed the Trial Examiner's order dismissing the complaint on the ground that the National Labor Relations Board has discretionary authority under the National Labor Relations Act to dismiss a complaint for policy reasons and such discretion was properly exercised where the National Labor Relations Board finds that interruption of the

employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce (R. 33).

Petitioner then filed a petition in the United States Court of Appeals for the Ninth Circuit for a review of the decision and order of the National Labor Relations Board affirming the Trial Examiner's order dismissing the unfair labor practice complaint (R. 71).

The Court of Appeals, after a hearing, dismissed the petition for review on the ground that the National Labor Relations Board, notwithstanding the existence of jurisdiction, has discretionary authority to dismiss unfair labor practice complaints on policy grounds (R. 83).

JURISDICTIONAL STATEMENT

The United States Court of Appeals entered its decree in this case on February 15, 1951 (R. 92).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), to-wit:

> "Cases in the Courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> "(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such

appellant, and the review on appeal shall be restricted to the Federal questions presented;

"(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 Stat. 928."

enacted pursuant to Article III, Section 2 of the Constitution of the United States.

The case was properly before the United States Court of Appeals for the Ninth Circuit.

The National Labor Relations Act, Section 10 (f) as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 160 (f)) states:

"Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the

same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

This section confers jurisdiction on the United States Court of Appeals for the Ninth Circuit. This jurisdiction is exclusive. *Le Baron v. Kern County Farm Labor Union,* 80 F. Supp. 15.

Petitioner is a "person aggrieved", within the meaning of Section 10 (f) of the Act, by the dismissal of the complaint because petitioner has not obtained the relief sought in his charge against the union. *Albrecht v. N.L.R.B.,* (C.A. 7, 1950) 181 Fed. (2d) 652.

The order of the Board dismissing the complaint is a "final order" within the meaning of Section 10 (f) of the Act. The order does fix the status of the parties in relation to the National Labor Relations Act for it results in denying petitioner the benefits provided by provisions of the Act designed to eliminate obstructions to the free flow of commerce. The order is not a stage in an incomplete process of administrative adjudication. The dismissal order grants an immunity to the parties complained against and imposes a correlative disability on petitioner thereby fixing the existing and future status under the Act of petitioner, his employees and the union. The order establishes the legal rights and relationships of petitioner and the parties complained against.

A judgment is understood to be final if it puts an end to the particular suit in which it is rendered, whether it finally determines the rights of the parties or not.

Weston v. City Council of Charleston, 27 U. S. 448 (1829); *U. S. v. Wallace and Tiernan Co.,* 336 U.S. 793, 69 S. Ct. 824, 93 L. Ed. 1042.

The Board's order was one "denying in whole" the relief sought. *Albrecht v. N.L.R.B.* (supra); *General Drivers, Chauffeurs and Helpers Local 886, AFL v. N.L.R.B.,* (C.A. 10) 179 Fed. (2d) 492; *Lincourt v. N.L.R.B.,* (C.A. 1) 170 Fed. (2d) 306; *Jacobsen v. N.L. R.B.,* (C.A. 3) 130 Fed. (2d) 96.

Petitioner transacts business in Portland, Oregon (R. 68).

Under the provisions in Section 10 (f) (supra) providing for review in the Court of Appeals for a final order of the Board, it is provided that the Court (Court of Appeals) shall proceed in the same manner as in the case of an application by the Board under Subsection (e).

The National Labor Relations Act, Section 10 (e) as amended by the Labor Management Relations Act of 1947 (29 U.S.C. 160 (e)) states in part:

> " . . . The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as

provided in sections 239 and 240 of the Judicial Code, as amended, (U.S.C., title 28, Secs. 346 and 347)."

This section further confirms the jurisdiction of the Supreme Court of the United States to review the decree of the Court of Appeals under Sections 239 and 240 of the Judicial Code, as amended (U.S.C., Title 28, Sections 346 and 347) (Now Title 28, U.S.C., Section 1254).

QUESTION PRESENTED

The question is whether or not the National Labor Relations Board, notwithstanding the existence of jurisdiction, has discretionary authority to dismiss unfair labor practice complaints issued by the General Counsel of the National Labor Relations Board on the ground that assertion of jurisdiction would not effectuate the policy of the National Labor Relations Act.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The decision of the Court of Appeals involves an important question of Federal law which has not been, but should be, settled by this Court (Supreme Court Rule 38 (5) (b)). The construction and interpretation of the Labor Management Relations Act, 1947, which upholds this discretion in the Board, results in government by man not by law.

2. The decision is in conflict with the principles enunciated in the decision of the Court of Appeals for the Third Circuit, concerning the same rights, in the case of *Jacobsen v. N.L.R.B.*, 120 Fed. (2d) 96 (1941). (Supreme Court Rule 38 (5) (b)).

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Conrt, directed to the U. S. Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said U. S. Court of Appeals had in the case numbered and entitled on its docket, No. 12412, HALESTON DRUG STORES, INC., Appellant (Petitioner), vs. NATIONAL LABOR RELATIONS BOARD, Appellee (Respondent), to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the decree herein of said U. S. Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated May 3, 1951.

HALESTON DRUG STORES, INC.,
By Wilber Henderson,
Counsel for Petitioner.

In the Supreme Court

of the United States

OCTOBER TERM, 1950

No.....

HALESTON DRUG STORES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 187 Fed (2d) 418. The opinion is also printed in full in the record (R. 83-92).

STATEMENT OF THE CASE

Petitioner filed an unfair labor charge against certain named unions (R. 2). The General Counsel of the National Labor Relations Board issued a complaint against said unions (R. 5). The National Labor Relations Board dismissed the complaint on the ground that it would not effectuate the policy of the Act to exercise jurisdiction (R. 23).

The United States Court of Appeals for the Ninth Circuit dismissed the petition for a review of this order of the Board (R. 92). Additional facts are set forth in the preceding petition in the statement of the matter involved (pp. 2-4), which facts are hereby adopted and made a part of this brief.

ARGUMENT

I.

The Decision of the United States Court of Appeals Involves an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by the Supreme Court of the United States.

A. The action of the Board dismissing the complaint does not carry out the purpose and policy of the National Labor Relations Act and constitutes a refusal to protect the rights of the public in connection with labor disputes affecting commerce.

The issue in this case is not whether the dismissal would or would not effectuate the policies of the Act,

but the fact that the Board has misconstrued the policy of the Act emphasizes the importance of an interpretation of the Act by this Court.

The policy of the Act, the ultimate end, is to promote the full flow of commerce. The means of attaining this end are those provisions defining the rights of employees and employers and those provisions establishing peaceful procedures for protecting these rights. The provisions establishing peaceful procedures are those concerning elections, complaints, hearings, testimony, evidence and review (Labor Management Relations Act, 1947 (29 U.S.C. 141 (b), 151). In Section 151, findings are made by Congress to the effect that certain practices (strikes, picketing, boycotts, hand bills) by some unions have the necessary effect of burdening commerce by preventing the free flow of goods.

The policy of the Act is to eliminate the causes of certain substantial obstructions to the free flow of commerce and to eliminate these obstructions by encouraging the practice and procedure of collective bargaining. The "substantial obstructions" are "certain practices by some unions" which burden commerce by preventing the free flow of goods. "Substantial obstructions" does not refer to the amount of business done by the employer in interstate commerce as the Board seems to believe when it states: " . . . we find that interruption of the employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33). The "certain practices" referred to are the economic weapons employed by unions such as the strike, boycott and blacklist.

The dismissal by the Board denies to petitioner the peaceful procedures of the Act whereby petitioner might have a determination of petitioner's legal rights and duties under the Act in the controversy existing between petitioner and the unions.

The lack of peaceful procedures to settle the legal rights and duties of petitioner and the unions under the Act results in continued interruption of commerce by picketing which is a substantial obstruction to the free flow of commerce.

Therefore, the dismissal does not effectuate the policy of the Act, but on the contrary, the dismissal is a refusal to protect the rights of the public in connection with labor disputes affecting commerce and there are many such disputes where the Board refuses to assume jurisdiction. This discretion was not delegated to the Board by Congress.

B. The interpretation of the Act granting the Board discretion to dismiss a complaint for policy reasons results in government by man, not by law, and creates confusion and uncertainty in a great number of businesses both large and small.

No standards are set forth in the Act defining the limits of the agency's claimed discretion.

The Board claims the right to assume or refuse jurisdiction in a particular case depending, not upon its merits, but upon the Board's budget or case load at the particular time that the case is reached on its trial calendar.

Neither employer, employee, nor labor organization is able to anticipate in such businesses as drugs, grocery, bakery, photography, hotel, automobile and hundreds more, whether to govern their activities with a view to the provisions of the National Labor Relations Act or the relevant state statutes regulating intrastate commerce because such discretionary power would be and is exercised without any body of precedent for guidance. In the bakery and automobile industry, the Board has not followed a consistent policy.

In the bakery cases consolidated in the case of *In re Fehr Baking Co.*, 79 N.L.R.B. 440 (1948), the Board refused to asssert its jurisdiction on the ground that it would not effectuate the policies of the Act, even though in one case purchases during the year amounted to one million dollars of which $509,000.00 were purchases outside the state.

Then in *McGough Bakeries Corp.*, 90 N.L.R.B.— No. 272 (1950), the Board exercised jurisdiction over a retail bakery where approximately one-half of the supplies purchased were purchases outside the state.

In *Newton Chevrolet, Inc.*, 37 N.L.R.B. 334 (1941), the Board exercised jurisdiction over an automobile dealer.

In *Herff Motor Company*, 74 N.L.R.B. 1007 (1947), the Board refused to exercise jurisdiction over an organization rebuilding automobile engines.

Then in *Liddon-White Truck Company, Inc.*, 76 N.L.R.B. 1181 (1948), the Board in exercising jurisdic-

tion stated: "Although we have on occasion refused to assume jurisdiction over enterprises similar to the employers on the ground that the investigation and processing of such cases by the Board would not effectuate the policies of the Act, we are of the opinion that the policies of the Act can be best effectuated if the organizational activities of the employees herein involved are conducted within, rather than without, the framework of the Act." Two members dissented, stating: "We would maintain the policy of self-abnegation enunciated in the Herff Motors case decided less than a year ago rather than return to doctrine that has lain quietly interred since Newton Chevrolet issued in 1941."

The Board supposedly established "yardsticks" for determining when it would exercise jurisdiction in eight decisions issued simultaneously in October, 1950, to-wit:

W.B.S.R., Inc., 91 N.L.R.R. ....., No. 110;

W. C. King dba Local Transit Lines, 91 N.L.R.L. ....., No. 96;

The Borden Co., 91 N.L.R.B. ....., No. 109;

Stanislaus Implement and Hardware Co., 91 N.L.R.B. ....., No. 116;

Hollow Tree Lumber Co., 91 N.L.R.B. ....., No. 113;

Federal Dairy Co., 91 N.L.R.B. ....., No. 107;

Dorns House of Miracles, Inc., 91 N.L.R.B. ....., No. 82;

The Rutledge Paper Products, Inc., 91 N.L.R.B. ....., No. 115.

In the Borden Company case (supra), the Board said it would exercise its jurisdiction in the case of

Multi-State Enterprises "even though management is entrusted to local officials and the particular plant may sell its entire product within the state where it is located".

In the Federal Dairy case (supra), the Board stated that its current budget and case load prevented it from taking cases involving companies that purchased less than $500,000.00 in materials from interstate sources in a year.

Shortly thereafter the Board departed from these yardsticks by announcing its intention not to take cases involving hotels or associations of hotels. *Hotel Association of St. Louis,* 91 N.L.R.B. ....., No. 561. To be consistent with previous policy, the Board should have taken jurisdiction on at least two grounds, i.e., (1) purchase of goods out of state valued at over $500,000.00; (2) several association members operated as part of interstate chains.

The fact, as illustrated by these cases, that the Board vacillates between assuming jurisdiction and refusing jurisdiction causes confusion and uncertainty in business relations over the entire country. It is important to the public that this Court settle the question of whether or not the Board has this discretion to dismiss complaints on policy grounds even though it has jurisdiction in fact.

C. The exercise by the Board of this claimed discretion usurps the "final authority" granted to the General Counsel and destroys the complete separation of function and authority between the General Counsel and the Board which Congress intended for the public interest and welfare.

The amendments of 1947 to the National Labor Relations Act established the office of the General Counsel of the Board. The General Counsel was given the exclusive duty to issue complaints and prosecute cases as an agency independent, though within, the Board. This is set forth in Section 3 (d) (29 U.S.C. 153 (d)) as follows:

> " '(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.' "

In issuing a complaint, the General Counsel necessarily finds:

(1) That there is probable cause to believe the existence of unfair labor practices;

(2) There is probable cause to believe there is jurisdiction to correct these practices;

(3) The nature of these unfair labor practices and the effect upon commerce is sufficient to warrant the exercise of the Board's corrective jurisdiction.

When the matter comes before the Board, it is free to find against the General Counsel on either (1) or (2). However, it is submitted that in view of the Section 3 (d), the Board has no discretion or authority to re-examine the General Counsel's decision with respect to the third factor. The dismissal of the complaint on policy grounds is a decision squarely in conflict with that of the General Counsel and constitutes, if valid, a review and reversal of his decision.

The final and unreviewable authority of the General Counsel is supported by the Act read as a whole wherein it appears that Congress intended to exercise its power over commerce to the fullest extent possible under the Commerce Clause and even over merely local businesses. *N.L.R.B. v. Fainblatt,* 306 U.S. 601, 606, 59 S. Ct. 668, 83 L. Ed. 1014 (1939); *N.L.R.B. v. Cowell Portland C. Co.,* 108 F. (2d) 198 (C.A. 9, 1939).

Under the National Labor Relations Act before amended in 1947, the Board was both prosecutor and judge and this situation led to intense dissatisfaction with such an administrative system. Congress intended, with the amendments of 1947, to separate these functions by establishing the office of General Counsel and giving him final authority in regard to investigating charges, issuing and prosecuting complaints. If functions are to be separated, the Board must not tell the General Counsel which cases it desires to hear. Otherwise, the

General Counsel would have to govern his decisions in issuing complaints according to the mandate of the Board. It would mean that after the effort in presenting the case has been expanded, after all the evidence has been taken, after the transcript has been prepared and submitted to the Board, after the parties have journeyed to Washington to argue the case before the Board, then, after all of that, the parties are told by the Board that the complaint should not have been issued in the first place. Congress could not have intended to create such a frustrated authority in the General Counsel. An agency so established could lead to nothing but confusion and useless expenditure of Government and private funds.

II.

The Decision of the United States Court of Appeals Is in Conflict with the Principles Enunciated in the Decision of the Court of Appeals for the Third Circuit in Jacobsen v. N.L.R.B., 102 F. (2d) 96 (C. A. 3, 1941).

In the Jacobsen case, after involved and prolonged proceedings of unfair labor practice charges against an employer, the Board dismissed the complaint because it could not determine from the record if it had jurisdiction. The decision of the Board stated:

> " 'We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the

> meaning of the Act. Under such circumstances we ordinarily would dismiss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety.' " (pp. 98-99).

Thereafter, the petitioner's petition to reopen before the Board was denied, and a petition to review was filed in the Court of Appeals seeking to reverse the order of the Board dismissing the complaint. The court remanded the matter to the Board clearly holding that since the jurisdiction of the Board was invoked, it must decide if it has jurisdiction and if it finds that it does have jurisdiction it must determine the unfair labor practice charges. It is apparent from the decision of the court that the Board's claim of discretion figured largely in the arguments before the court because the court stated:

> "We have dealt with the ramifications in this case in such detail because the questions presented are those both of jurisdiction and discretion." (p. 99)

In holding that the Board must determine its jurisdiction and thereafter determine the question of unfair labor practices, the court stated:

> "The Board is the judge of the facts and if its findings are supported by substantial evidence we must accept them. It has made no finding upon the fundamental issue of commerce affected. The Board took inconsistent positions. It stated that

the record did not afford a basis for determining whether the operations of Protective Motor Service Company affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue. Aside from any question presented as to the right of the petitioners to adduce additional evidence, *the Board, having issued its complaint and proceeded to hearings, had the duty to decide in limine whether or not the operations of the Protective Motor Service Company affected commerce within the meaning of the act, and in our opinion it was error for the Board not to do this.*" (Emphasis added) (pp. 100-101)

. . . . .

"Accordingly a decree will be entered setting aside the order of the Board and remanding the cause with directions to reinstate the complaint, to allow the petitioners a reasonable opportunity to present the evidence referred to in their petitions, and to determine the issue of interstate commerce, *and if it be found that the operations of Protective Motor Service do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.*" (Emphasis added) (p. 101)

It is true that the court in the Jacobsen case did not have the same question before it as is involved in this proceeding. It could not, of course, because at that time the General Counsel's office did not exist. However, the opinion, fairly construed, is a determination that when the jurisdiction of the Board is invoked the Board has the duty of first determining its jurisdiction in fact; secondly, if it has jurisdiction, to determine the unfair labor practice question; and thirdly, if it finds unfair

labor practices have been committed, issue an appropriate order with respect to them.

It is therefore submitted that this case is one calling for the exercise by this court of its discretionary power, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

WILBER HENDERSON,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 59

HALESTON DRUG STORES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 83–92) is reported at 187 F. 2d 418. The Decision and Order of the Board (R. 23–33) is reported at 86 N. L. R. B. 1166.

JURISDICTION

The decree of the court below was entered on February 15, 1951 (R. 92). The petition for a writ of certiorari was filed on May 11, 1951. The jurisdiction of this Court is invoked under 29 U. S. C. 1254 (1), and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

The General Counsel of the Board, after preliminary investigation of a charge filed by petitioner, issued an unfair labor practice complaint. Although the unfair labor practices affected commerce within the meaning of the Act, the Board found that, because the business involved is essentially local, it would not effectuate the policies of the Act to exercise jurisdiction. The question presented is whether, in these circumstances, the Board had authority to dismiss the complaint issued by the General Counsel.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Secs. 141, *et seq.*), are set forth in the Appendix, *infra,* pp. 18–23.

STATEMENT

In October 1948, petitioner (herein referred to as "Haleston") requested the Board, under Section 9 (c) (1) (B) of the Act, to determine whether employees at its four retail drug stores in Portland, Oregon, desired to be represented, for collective bargaining purposes, by Retail Clerks' International Association, Food and Drug Clerks, Local No. 1092, A. F. L. The representation petition was docketed as "Case No. 36–RM–26," and a hearing thereon was held before a hearing officer of the Board. (R. 67, 34–66.)

At the hearing, the Union moved to dismiss the proceeding on the ground "that the operation of the Employer is not one which affects interstate commerce, and that, even if it does affect interstate commerce, then it would not effectuate the policies of the Act to exercise jurisdiction" (R. 67–68).

On April 15, 1949, the Board issued its decision and order in Case No. 36–RM–26 (R. 67–69). Upon the record formulated at the hearing, the Board made the following findings respecting Haleston's business (R. 68):

> The Employer-Petitioner, an Oregon corporation, operates four retail drug stores in Portland, Oregon, at each of which it sells conventional lines of drugs and cosmetics, operates a soda fountain, and prepares and sells medical prescriptions. During the period from January 1, 1948, to December 15, 1948, the employer made purchases for resale totaling $189,157.39, of which approximately 30.15 percent was shipped to the Employer directly from points outside the State of Oregon. Approximately 60 to 70 percent of the purchases made within the State was of goods originating outside the State, having been purchased from warehouses engaged in interstate commerce including McKesson & Robbins, Upjohn Company, and Sharpe & Dohme. Sales during the same period totaled $308,011.21, all being made locally at the Employer's drug stores.

On these facts, the Board concluded that it would not "effectuate the policies of the Act to assert jurisdiction inasmuch as the Employer's business is essentially local in character," and accordingly ordered that the representation petition be dismissed (R. 69).

Meanwhile, on March 15, 1949, Haleston had filed an unfair labor practice charge with the Board's Regional Director for the Nineteenth Region. This charge, docketed as "Case No. 36–CB–7," alleged that the Culinary Workers Alliance was, in violation of Section 8 (b) (2) of the Act, attempting to force Haleston to sign a collective bargaining contract which contained illegal union security provisions (R. 2–4).

Before investigation of the charge, as provided in Section 10 (b) of the Act, was completed, the Board had entered its order dismissing Case No. 36–RM–26. Nevertheless, on completion of such investigation, the then General Counsel of the Board, acting through the Regional Director and pursuant to Section 3 (d), issued an unfair labor practice complaint in Case No. 36–CB–7 (R. 5–11). The respondent Union, pointing to the dismissal of the representation proceeding, urged the Board to dismiss the complaint for the same reason, that it would not effectuate the policies of the Act to exercise jurisdiction (R. 12).

On August 15, 1949, the Trial Examiner who had been appointed to hear the unfair labor

practice case granted the respondent Union's motion to dismiss the complaint (R. 16–17). His ruling was predicated on "the commerce allegations in the complaint," and on "official notice of the findings and conclusions of the Board" in Case No. 36–RM–26, "wherein the Board * * * concluded that 'it would not effectuate the policies of the Act to exercise jurisdiction' " over Haleston's business (R. 17). Haleston requested the Trial Examiner to reconsider his ruling (R. 17–18), and, in support of this request, submitted an affidavit (R. 19–21) containing "additional" evidence on the scope of Haleston's operations. The General Counsel of the Board also sought reconsideration of the Trial Examiner's action (R. 21–23).

On October 31, 1949, the Board, after considering the motions of Haleston and of the General Counsel, and the entire record in the proceeding, affirmed the Trial Examiner's action and entered an order dismissing the complaint in the unfair labor practice proceeding, Case No. 36–CB–7 (R. 23–33). The Board held that the Trial Examiner properly took official notice of the record and findings of the Board in the prior representation proceeding involving Haleston (R. 25). The Board went on to examine "the additional facts which the Employer and the General Counsel offer to prove concerning the relationship of the Employer's business to commerce," and found that (R. 25–26):

> The amounts of the various transactions differ quantitatively from these which appear in the record of the representation proceeding. Nevertheless they still show no more than that the Employer operates a chain of retail drug stores in Portland, Oregon, making substantial out-of-State purchases but selling all of its merchandise locally. That is precisely the situation that presented itself in the representation case * * *

The Board then considered the General Counsel's contention that, once he has issued an unfair labor practice complaint, the Board is without authority to dismiss the complaint "solely because it believes that to assert jurisdiction would not effectuate the policies of the Act" (R. 26–27). After analysis of the Board's functions under the original and amended Acts, and of the relevant legislative history of the amended Act, the Board concluded that the provisions of Section 3 (d) of the amended Act, which created the independent office of General Counsel and vested the General Counsel with final authority "in respect of the investigation of charges and issuance of complaints under Section 10," did not deprive the Board of its power to dismiss a complaint for policy reasons (R. 27–32).

On the facts of this case, the Board further concluded that it was proper to exercise such power here, for retail drug stores are "essentially local operations" (R. 26), and therefore "interrup-

tion of the Employer's business operations by a labor dispute would have only a remote and insubstantial effect on commerce" (R. 33). Accordingly, the Board, like the Trial Examiner, dismissed the complaint on the ground that it would not effectuate the policies of the Act to assert jurisdiction over Haleston's business (R. 24, 33).

Haleston then petitioned the court below, under Section 10 (f) of the Act, for review of the Board order dismissing the complaint in the unfair labor practice proceeding, Case No. 36–CB–7. The court held that the Board had acted within its statutory power, and accordingly dismissed Haleston's petition for review (R. 83–92).

ARGUMENT

Petitioner's contention that the Board lacks authority to dismiss an unfair labor practice complaint, where it finds that the exercise of jurisdiction would not effectuate the policies of the Act, presents no substantial question warranting further review. The Act as amended leaves unchanged the provisions establishing the discretion the Board has always had to determine whether the exercise of its jurisdiction would effectively serve the policies entrusted by Congress to its administration. This Court so recognized in *National Labor Relations Board* v. *Denver Building & Construction Trades Council,* No. 393,

1950 Term, decided June 4, 1951, wherein it stated (sl. op. p. 8): "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes *properly* declines to do so, stating that the policies of the Act would not be effectuated by its assertion of jurisdiction in that case." (Italics supplied.)

There is nothing in the language of Section 3 (d) to support petitioner's contention that this provision removed from the Board, and confided solely to the General Counsel, the power to decline exercise of jurisdiction for policy reasons. And the legislative history of the Section plainly sustains the contrary conclusion of the Board and the court below, a conclusion adopted by the only other court of appeals which has considered the question. *Local Union No. 12* v. *National Labor Relations Board* (No. 10310, C. A. 7). Accordingly, since the decision below is plainly correct, since there is no conflict, and since petitioner's assertion of a contest of power between the Board and its General Counsel is unlikely to be more than an academic question in the forseeable future, we submit that there is no occasion for review by this Court.

1. The Board's discretionary power to decline jurisdiction was created and continued by the unchanged terms of Section 10 of the Act. As the court below stated (R. 88): "By the express language of § 10 (a) the Board was and still is

empowered (not directed) to prevent persons from engaging in unfair labor practices affecting commerce. Its discretionary authority in respect of its assertion of jurisdiction was never * * * questioned under the Act as it existed prior to 1947." Similarly, this Court, in recognition of the discretionary language of Section 10 (a) and the similar language of Section 10 (b), has pointed out that the "Board has wide discretion in the issue of complaints. * * * It is not required by the statute to move on every charge; it is merely enabled to do so. * * * The Board might properly withhold or dismiss its own complaint * * *." *National Labor Relations Board* v. *Indiana and Michigan Electric Co.*, 318 U. S. 9, 18–19. And so, as the court below added (R. 88–89), under the Wagner Act the "Board itself, without judicial challenge, acted on the assumption that it could, for reasons of policy or for budgetary or other reasons, decline to issue an unfair labor practice complaint, or to dismiss a complaint after issuance without determining the existence of an unfair practice, if in its reasoned judgment the policies of the Act would be best served by that course."[1]

The propriety of this settled administrative judgment, sustained by the retention in Section 10 as

[1] See *Brown & Root, Inc.*, 51 N. L. R. B. 820; *Godchaux Sugars, Inc.*, 12 N. L. R. B. 568, 576–579; *Consolidated Aircraft Corp.*, 47 N. L. R. B. 694, 706–707; *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 501; *Allis-Chalmers Mfg. Co.*, 72 N. L. R. B. 855.

amended of the discretionary language referred to above (Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 365–366), is not altered by petitioner's erroneous assumption that the nonexercise of jurisdiction impedes rather than effectuates the policies of the Act (Pet. 12–14) and that the discretion to assert or decline jurisdiction cannot exist because it creates confusion and uncertainty (Pet. 14–17). If these assertions were valid, they would obliterate completely the power to decline jurisdiction, for they apply not only where the power is exercised *after* a complaint has issued but also where it is exercised *before* issuance. But petitioner refutes its own assumptions by conceding that the General Counsel may decline to issue a complaint, though legal jurisdiction exists, if he believes that the effect of the unfair labor practices upon commerce is not "sufficient to warrant the exercise of the Board's corrective jurisdiction" (Pet. 19).[2]

[2] There are other reasons why petitioner's assumptions are invalid. As to the suggestion that the nonexercise of jurisdiction impedes rather than effectuates the policies of the Act:

(1) Section 1 of the Act admonishes the Board to "eliminate the causes of certain *substantial* obstructions to the free flow of commerce" [emphasis added]. This reference to "substantial obstructions," as this Court indicated in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 223–224, means that, notwithstanding the existence of legal jurisdiction, the Board has an overriding obligation

2. Petitioner's recognition that administrative power exists to withhold the Board's jurisdiction where it might legally be asserted shows that the issue here, as in the court below (R. 91), is "not whether there is power to withhold jurisdiction on the grounds the Board has advanced here, but whether the power resides solely in the General Counsel." We submit that the court was clearly correct in rejecting the contention (Pet. 18–20) that the General Counsel acquired such exclusive power from the provisions in Section 3 (d) of the Act giving him "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10 * * *."

"Certainly the language of § 3 (d) affords no satisfactory evidence of such a purpose" (opinion below, R. 92). It is clear, of course, as the

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to determine, in each case where the employers are not themselves actually engaged in interstate commerce, that commerce is threatened in a substantial enough manner to justify the exercise of Federal power. See also, *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 268 (C. A. 3), certiorari denied, 314 U. S. 693.

(2) Dismissal of a complaint for the reason that the business involved has only a remote effect upon commerce also affirmatively contributes to removing causes of labor disputes or obstructions to commerce. By declining to entertain "local" cases, the Board frees the budget and personnel they would otherwise tie up, thereby facilitating prompter disposition of cases with a far greater impact on commerce. Cf. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767, 776, 778; *United States* v. *Morton Salt Co.*, 338 U. S. 632, 647–648.

Board observed in this case (R. 31), that the General Counsel now has "unfettered discretion" in determining whether to issue and how to prosecute a complaint.[3] But there is nothing in this assignment of responsibilities to the General Counsel as prosecutor to suggest a limitation upon the Board when it subsequently discharges its adjudicative function.

Nor can petitioner infer a limitation on the Board's authority from the circumstance that power in the Board to dismiss on policy grounds a complaint issued by the General Counsel would cause the General Counsel "to govern his decisions in issuing complaints according to the mandate of the Board" (Pet. 19–20). A Board conclusion contrary to that of the General Counsel on the policy question affects his discretion no more than does the Board's rejection of his views as to whether unfair labor practices have been committed or whether legal jurisdiction exists. The Board action in both cases provides a rule which should govern the General Counsel's disposition of future charges involving similar situations.

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[3] Consequently, the Board has recognized that it cannot compel the General Counsel either to issue or refrain from issuing a complaint, or to review his action in refusing to issue one. *Times Square Stove Corp.*, 79 N. L. R. B. 361, 363–366; *Columbia Pictures Corp.*, 85 N. L. R. B. 1085, 1086–1087. See also *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306 (C. A. 1); *General Drivers* v. *National Labor Relations Board*, 179 F. 2d 492 (C. A. 10).

The legislative history of Section 3 (d) confirms this. As the court below pointed out (R. 89), the "well-understood purpose of Congress" in enacting Section 3 (d) was simply "to effect a separation of the prosecuting and adjudicating functions within the Board." The evil against which Section 3 (d) was directed was the danger of the Board's *prejudgment* of a case which it would ultimately decide after it had in some degree participated in the determination to issue the complaint. The provision sought to eliminate this danger by transferring the function of determining whether a complaint should issue from an "anonymous committee of subordinate employees," controlled by the Board, "to a statutory officer responsible to the President and to the Congress." 93 Cong. Rec. 6859, Leg. Hist. p. 1623 (Senator Taft, quoted in opinion below, R. 89, n. 3).

It was unnecessary, indeed repugnant, to this well-known legislative purpose to strip from the Board and confer exclusively upon the General Counsel the adjudicative power—which the Board had repeatedly exercised with respect to complaints issued on its own authority (see n. 1, p. 9, *supra*)—to determine whether, as a matter of policy, jurisdiction should or should not be exercised. Congress neither expressed nor intended a grant of such combined powers to the General Counsel. Instead, in referring to the

amendments, their co-sponsor, Senator Taft, emphasized several times that the General Counsel's decision would "be subject to the judicial decision of the Board." 93 Cong. Rec. 7538, 6859; Leg. Hist. pp. 1656, 1623. And there is no doubt that he meant the General Counsel's decision on jurisdictional policy questions as well as on the merits. For, on subsequent occasions when Congress had before it measures that would have abolished the General Counsel's final authority under Section 3 (d), Senator Taft, with specific reference to the differences between the Board and the General Counsel on the matter of asserting jurisdiction over local enterprises, declared that under the present statutory scheme: "Gradually these differences between the Board and the General Counsel * * * will be resolved by the Board, *and of course* the Board has the final word." [Emphasis added.] [4]

3. The only other decision of a court of appeals which deals squarely with the question whether, under the amended Act, the Board has discretionary authority to dismiss a complaint for the policy reasons here involved is *Local Union No. 12* v. *National Labor Relations Board* (No. 10310, C. A. 7), decided May 23, 1951. This recent deci-

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[4] *Hearings before the Senate Committee on Expenditures in the Executive Departments on S. Res. 248*, 81st Cong., 2d Sess., p. 36. See also, *id.*, at 40; *Hearings before the Senate Committee on Labor and Public Welfare on S. 249*, 81st Cong., 1st Sess., pp. 176, 1026.

sion follows and adopts the holding of the court below.[*]

Contrary to petitioner's contention (Pet. 20–23), the decision below does not conflict with *Jacobsen* v. *National Labor Relations Board,* 120 F. 2d 96 (C. A. 3). As petitioner concedes (Pet. 22), "the court in the *Jacobsen* case did not have the same question before it as is involved in this proceeding." There, the Board had not, as here, determined, on the basis of an adequate record of commerce facts, that the assertion of jurisdiction would not effectuate the policies of the Act. Instead, it "took inconsistent positions. It stated that the record did not afford a basis for determining whether the operations of (the employer) affect commerce within the meaning of the act and then, in an exercise of discretion, refused to receive additional evidence upon this very pertinent issue." 120 F. 2d, at 100–101. Consequently, the Third Circuit held that the Board could not avoid consideration of the merits through a refusal to decide, or take material evidence on, the essential preliminary question of its own jurisdiction. The court did not decide that the Board is precluded from withdrawing its process where, as here, it does determine, upon a consideration of all material facts, the essential preliminary question of the effect on commerce and goes on to

[*] This case, however, did not present any issue as to allocation of the authority between the Board and the General Counsel.

make clear "that it has exercised the discretion with which Congress has empowered it." *Phelps-Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197.[8]

4. The issue of who has the power to decline jurisdiction for policy reasons—the General Counsel alone, or the Board as well—is not likely to arise again. As the court below suggested (R. 91, n. 5): "The present general counsel [unlike his predecessor] may and presumably does pursue a less inflexible policy, that is to say, one more in harmony with the views of the Board." The present General Counsel has confirmed this by indicating, when the Board in October, 1950 enunciated the jurisdictional yardstick referred to by petitioner (Pet. 16), that he would apply the same yardstick in issuing complaints under Section 3 (d).[9]

It may also be noted that, between August 22, 1947, when the amended Act became effective, and May 17, 1951, there were 38 cases in which the Board dismissed unfair labor practice com-

[8] The court's direction to the Board to determine whether unfair labor practices have been committed and to issue an appropriate order in respect thereto is consistent with the above analysis. Since there was nothing in the record which indicated that the Board had any other valid reason for declining to decide the merits, the court properly concluded that, if legal jurisdiction were found to exist, the Board would have no alternative but to determine whether unfair labor practices had occurred. As to the Board's subsequent action, see *Protective Motor Service Co.*, 40 N. L. R. B. 967.

[9] See *Business Week*, October 14, 1950, p. 121; *U. S. News & World Report*, October 13, 1950, p. 47.

plaints issued by the General Counsel because the business involved was not substantial enough to warrant the exercise of jurisdiction. In none of these cases, except the two decided by the court below,[7] have the parties involved challenged in the courts the Board's power to rule, contrary to the view of the General Counsel, that as a matter of policy the case was not an appropriate one for exercise of the Board's jurisdiction.

CONCLUSION

The decision below is clearly correct, and presents no substantial question warranting review. No conflict of decisions is shown. And the question here raised by petitioners is not likely to arise again in the foreseeable future. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

NORTON J. COME,
Attorney,
National Labor Relations Board.

JUNE 1951.

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[7] The court below decided *H. W. Smith, d/b/a A-1 Photo Service* v. *National Labor Relations Board* along with the *Haleston* case. The parties in the former case have not applied for a writ of certiorari.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and

affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by

protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

SEC. 3. * * *

* * * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * *

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on

some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 9. * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or other-

wise: *Provided,* That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting

the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723–B, 723–C).

U. S. GOVERNMENT PRINTING OFFICE: 1951